

DEC 17 1976

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. 76-180

HENRY SMITH, etc., *et al.*,*Appellants,*

v.

ORGANIZATION OF FOSTER FAMILIES FOR
EQUALITY AND REFORM, *et al.*,*Appellees.*

No. 76-183

BERNARD SHAPIRO, etc., *et al.**Appellants,*

v.

ORGANIZATION OF FOSTER FAMILIES FOR
EQUALITY AND REFORM, *et al.*,*Appellees.**(continued)*

No. 76-5193

NAOMI RODRIGUEZ, *et al.*,

Appellants,

v.

ORGANIZATION OF FOSTER FAMILIES FOR
EQUALITY AND REFORM, *et al.*,

Appellees.

No. 76-5200

DANIELLE GANDY, *et al.*,

Appellants,

v.

ORGANIZATION OF FOSTER FAMILIES FOR
EQUALITY AND REFORM, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR INFANT APPELLANTS GANDY, *et al.*

HELEN L. BUTTENWIESER

Danielle and Eric Gandy, *etc.*

575 Madison Avenue

New York, New York 10022

Tel. No. (212) 826-1600

Attorney for Infant Appellants

On the Brief:

EPHRAIM LONDON

FRANCIS L. VALENTE

(i)

TABLE OF CONTENTS

	<i>Pages</i>
OPINION BELOW	2
GROUND OF JURISDICTION	3
CONSTITUTIONAL PROVISIONS AND STAT- UTES AND REGULATION INVOLVED	3
THE QUESTIONS PRESENTED FOR REVIEW	4
STATEMENT OF THE FACTS	5
ARGUMENT	
Point I	
The Court Below, In Directing the Conduct of Adversary Proceedings Before a Child may be Removed from a Foster Home, Encroached Upon the Domain of the New York Legislature	10
Point II	
The Order Under Review Impairs a Constitu- tionally Protected Right and is not Ration- ally Related to the Accomplishment of the Lower Court's Objective	17
CONCLUSION	21
APPENDIX	1a

TABLE OF AUTHORITIES

Cases:

Federal Trade Commission v. Jantzen, 386 U.S. 228	10
Ex Parte Burrus, 136 U.S. 586	10,11
Ginsberg v. New York, 390 U.S. 629	10
Labine v. Vincent, 401 U.S. 532	10,16
Ferguson v. Skrupa, 372 U.S. 726	14,16
Williamson v. Lee Optical of Oklahoma, 348 U.S. 483	16
Younger v. Harris, 401 U.S. 37	16

(ii)

Page

Hoffman v. Pursue Ltd., 420 U.S. 592	16
Stanley v. Illinois, 405 U.S. 645	18,19
Prince v. Massachusetts, 321 U.S. 158	18
Meyer v. Nebraska, 262 U.S. 390	18
Bullock v. Carter, 405 U.S. 134	18
Skinner v. Oklahoma, 316 U.S. 535	18
King v. Smith, 392 U.S. 309	19
Aptheker v. Secretary of State, 378 U.S. 500	19

Constitutional Provisions & Statutes:

Constitution of the United States:

Fifth Amendment	3
Fourteenth Amendment, Section 1	3
New York Social Services Law §400	3,4
New York Social Services Law §383.2	4
New York Social Services Law §398	5
New York Social Services Law §395	5
New York Social Services Law §392	6,7,8,13,19
New York Social Services Law §384-a	9,13,18,21
New York Social Services Law §384-b-1(a)-(b)	11,12
New York Social Services Law §385.3	13,14

Regulations:

New York State Rules and Regulations §450.14	4
--	---

The Opinions and Orders of the District Court and the "Answer" of Court Appointed Counsel for the Children are Contained in the Joint Appendix to the Jurisdictional Statements, hereinafter referred to as Joint Appendix.

Certain specified Statutory Provisions Appear as Appendices to the Brief of Appellants Rodriguez in Accordance with an Agreement Confirmed in a Letter to Michael Rodak, Jr. Clerk of the Supreme Court and are so identified.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-180

HENRY SMITH, etc., *et al.*,

Appellants,

v.

ORGANIZATION OF FOSTER FAMILIES FOR
EQUALITY AND REFORM, *et al.*,

Appellees.

No. 76-183

BERNARD SHAPIRO, etc., *et al.*

Appellants,

v.

ORGANIZATION OF FOSTER FAMILIES FOR
EQUALITY AND REFORM, *et al.*,

Appellees.

No. 76-5193

NAOMI RODRIGUEZ, *et al.*,

Appellants,

v.

ORGANIZATION OF FOSTER FAMILIES FOR
EQUALITY AND REFORM, *et al.*,

Appellees.

 No. 76-5200

DANIELLE GANDY, *et al.*,*Appellants,*

v.

ORGANIZATION OF FOSTER FAMILIES FOR
EQUALITY AND REFORM, *et al.*,*Appellees.*

 ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR INFANT APPELLANTS GANDY, *et al.*

OPINIONS BELOW

The majority and minority opinions of the three-judge District Court for the Southern District of New York granting declaratory and injunctive relief are reported at 418 F. Supp. 277. They are printed in Appellants' Joint Appendix to Jurisdictional Statements, [hereinafter "Joint Appendix"] at pp. 1a-35a. The opinion of United States District Judge Robert L. Carter dated December 10, 1974, appointing separate counsel for the infant Appellants is not reported and is printed in the Joint Appendix at pp. 54a-68a. The opinion granting motions to certify classes of foster children, natural parents and foster parents is not reported, and is printed in the Joint Appendix at pp. 42a-50a.

GROUND OF JURISDICTION

The final Order and Judgment appealed from was entered in the District Court on April 14, 1976. (Joint Appendix pp. 36a-38a). The notice of appeal to this Court was filed in the District Court on June 16, 1976, (Joint Appendix pp. 41a-41c).

The Jurisdictional Statement was filed August 6, 1976, and probable jurisdiction was noted by this Court on October 12, 1976.

The jurisdiction of this Court rests on 28 U.S.C. §1253.

**CONSTITUTIONAL PROVISIONS, AND
STATUTES AND REGULATION INVOLVED***Fifth Amendment to the Constitution:*

No person shall be . . . "deprived of life, liberty, or property, without due process of law; . . ."

*Fourteenth Amendment to the Constitution:**Section 1.*

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sections 383(2) and 400 of the New York Social Services Law, and 18 New York Codes, Rules and Regulations §450.10 are produced in the Appendix to

Brief of Appellants Rodriguez et al., pp. 51-53a. Sections 385.3, 395, 398 are appended to this Brief pp. 3a-12a. Sections 384-a, 384-b, 392 are reproduced in Appendices "2" to "8" attached to the Brief of Appellants Rodriguez et al.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the New York legislative policy with respect to children in foster care, of returning the children to permanent homes with their parents or adoptive parents without unnecessary delay, is a valid government objective.

(a) If so, whether §§383.2 and 400 of the New York Social Services Law and New York City Rules and Regulations §450.14 (declared unconstitutional as applied, in the order on appeal) are rationally related to the accomplishment of the government objective.

2. Whether a child in a foster home for more than a year has a constitutional right to an adversary hearing before the child is removed from the foster home to be returned to his or her parent, or to be sent to live with a family wishing to adopt the child, or is to be removed for any other reason.

3. Whether the Federal District Court, in directing the conduct of evidentiary hearings on notice before a child, who has been in a foster home for more than a year may be removed from such home, exercised a legislative function.

4. Whether a fit parent whose child has been in a foster home for more than a year, has a constitutional right to the care and custody of his or her child.

(a) If so, whether that right is impaired by an order directing a compulsory adversary hearing, which could result in a determination that the child should

not be returned to his or her parent, and an administrative and Court review of the decision made after the hearing.

STATEMENT OF THE FACTS

This action relates to the rights of children in New York who have been placed *temporarily* with foster parents, and the rights of their parents¹ and foster parents.

Parents who are unable to adequately care for their children for a time may commit them for temporary care to the County or City Commissioner of Social Welfare.² The Commissioner may place the child directly with a foster parent or delegate the placement and supervision of the foster home to a private social agency.³ Temporary placement of a child with a foster family is governed by a written agreement between the Commissioner or social agency and the foster parent, which includes an undertaking by the foster parent to assist the child to return to his or her natural parent (A. 76a). There is a provision in the agreement for payment to the foster family to cover the cost of care of the foster child (A. 76a).

To the extent possible, foster parents are selected by the Commissioner or by the authorized agency to meet the particular needs of a child. An infant may be placed

¹ The term "parent" as used in this brief refers to a child's natural or biological parent.

² New York Social Services Law §398 (Appendix to Brief, p. 4a).

³ New York Social Services Law §395 (Appendix to Brief, p. 4a).

with an elderly woman who enjoys caring for very young children. If the placement is prolonged and the foster parent is unable properly to supervise an active child, the child may be transferred to younger foster parents. One of the principal reasons for removing a child from a foster home is that his or her parent is able to and wants to care for the child. Another reason for removal, when a child has been freed for adoption, is to place the child with a family that intends to adopt him or her. Still another reason for removal may be that a foster parent was discouraging the development of a relationship between a child and her or his parent during the time the parent was unable to assume full responsibility for the child.

New York Social Services Law⁴ §392(2) provides for review by the New York Family Court of the status of each child who has been with a foster parent eighteen months. Similar proceedings are conducted every two years thereafter (or at shorter intervals if the Court deems it appropriate). Such review is on notice to the foster parents and the natural parents, and the child is present during the proceeding unless the Court, in its discretion, dispenses with the child's appearance. All the parties, may be represented by counsel in the proceeding and the children are represented by Law Guardians. The Court, after hearing, determines whether the best interests of the child require the continuance of foster care, or the return of the child to his or her parent or a relative, or the institution of proceedings to legally free the child for adoption, Social Services Law §392.7 and 9. The Family Court may also direct an authorized agency "to encourage and strengthen the parental relationship" and to assist the parent "in

⁴ Hereafter referred to as "Social Services Law."

obtaining adequate housing, employment... or psychiatric treatment", Social Services Law §392. The Family Court's decisions must be based on the child's best interests. That is true in all cases in New York involving the custody or care of a child.

This action was brought by an association of foster parents and individual foster parents who feared that their foster children are to be wrongfully removed from their homes (A. 15). Also named as Plaintiffs are children who had been placed with the foster parents for care. All the Plaintiff children were under the age of 12 when the action was instituted.

Because this action was brought by one attorney acting for all Plaintiffs, — the foster parents, the Association of Foster Parents and the foster children, — the Court, to avoid the possibility of a conflict of interest, appointed Helen L. Bittenwieser counsel for the children.

In affirming his determination to appoint separate counsel for the foster children, Judge Carter wrote (Joint Appendix 58a-59a):

"Upon examination of the pleadings, the court was most concerned that all of the allegations of the complaint were based on the uncritical assumption that the rights and interests of the children are identical to those of the foster parents. . . ."

The foster parents contended in the Court below that after children are with foster parents for a year, a right of family privacy arises, which entitles temporary foster parents to the same constitutional protections afforded to parents. They argued that, as children may not be taken from their parents, they may not be removed from the custody of foster parents with whom they have been living for a year, without a prior adversary hearing. The District Court ruled that foster parents with whom children have been placed temporarily do

not have a constitutional right in their relationship with the foster children (Joint Appendix 8a-9a). The Court below held, nevertheless, that before a child who has been with a foster parent for a year or more, may be taken from the foster home, an adversary hearing before an "administrative decisionmaker charged with determining the future placement of the child" is constitutionally mandated (Joint Appendix 10a).

The District Court discussed, in its decision, the review of the status of children in foster care for eighteen months, provided for by Social Services Law §392 and the periodic review by the Family Court thereafter. In the order on appeal, the Court excepted from its injunction against removal, without a prior evidentiary hearing, of all children in a foster home for more than a year, only (1) the removal of a child pursuant to Court order and (2) the removal of a child at the request of the foster parent (Joint Appendix 37a). Thus, an adversary hearing is required under the District Court's order when a child has been in foster care eighteen or more months, after the Family Court shall have conducted a full adversary proceeding in which the child shall have been represented, (unless the Family Court ordered the removal of the child).

There is no basis in the record for the assumption that foster children's best interests are not considered and served by the Commissioner of Social Welfare or the authorized agencies charged with supervising the foster care of children, under the existing statutes. Commissioners and agencies are fallible, of course, and in particular cases may make questionable decisions. There is no reason to believe, however, and there is no evidence in this proceeding to indicate, that such decision will not be corrected under the existing laws and regulation or that, in the great majority of cases, the existing procedures are not more diacritical in

perceiving the needs and interests of foster children, than the kind of hearing ordered by the Court below.

The order of the Court below is in conflict with Section 384-a of the Social Services Law. That statute was enacted in 1975,⁵ while this case was pending, and several months before the decision of the lower Court was announced and the order on appeal was made. Section 384-a provides that when a parent transfers a child to an authorized agency by written instrument providing that the child is to be returned to the parent so long as the parent is capable of caring for the child, on a date certain, or upon the occurrence of an identifiable event, such agency shall "*return such child at such time*"⁶ . . . unless there is an existing order to the contrary.⁷ Section 384-a also provides that if the written arrangement between the parent and agency does not specify a date or identifiable event upon which the child is to be returned, the "agency shall return the child within ten"⁸ days after having received notice that the parent . . . wishes the child returned."

Assigned counsel to the foster children named as Plaintiffs in this case, is of the belief, based upon more than forty years experience in the placement of children for foster care, that the interests of children who have been with foster parents more than a year will be best served by reuniting them with their parents

⁵ It was re-enacted with additional provisions in 1976.

⁶ Emphasis added.

⁷ Obviously, if there is to be a hearing before an administrative officer before a child is returned to a parent, in accordance with the direction of the Court below, the administrative officer may decide that the child is not to return to the parent as provided in Social Services Law §384-a, but is to remain in the foster home.

⁸ Increased to twenty days by the 1976 amendment.

who are able to, and who want to, care for them.⁹ As the Court below noted in its opinion, the assigned counsel to the foster children is also of the opinion that the existing rules and the existing procedures, in which disinterested professionals participate, are less likely to disturb foster children and are more likely to "elicit the sensitive and personal information" requisite to a decision with respect to the children's best interests, than the formal adversary proceeding, with its concomitant tensions, mandated by the Court below (Joint Appendix 16a).

POINT I

THE COURT BELOW, IN DIRECTING THE CONDUCT OF ADVERSARY PROCEEDINGS BEFORE A CHILD MAY BE REMOVED FROM A FOSTER HOME, EN-CROACHED UPON THE DOMAIN OF THE NEW YORK LEGISLATURE.

"The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed." Mr. Justice Holmes, quoted in *Federal Trade Com. v. Jantzen*, 386 U.S. 228, 235.

The guardianship of children in need of protection is the function of the state in which the children live. *Ex Parte Burrus*, 136 U.S. 586, 594; *Ginsberg v. New York*, 390 U.S. 629, 639; *Labine v. Vincent*, 401 U.S.

⁹If the best interest of the child will not be served by his or her returning to a natural-parent, that may be determined in administrative proceedings or by a court under existing laws and regulations.

532, 540. *Ex Parte Burrus*, 136 U.S. 586, involved the custody of a child. This Court held that a federal district court was in error in accepting jurisdiction of the matter, for a federal court can "not exercise the common law function of *parens patriae*." (136 U.S. at p. 594)

The New York legislature adopted a policy of restoring, without unnecessary delay, the relationships between children placed temporarily in foster care and their parents, when their parents are able to take care of them. When parents are not able to provide a proper home or have demonstrated a lack of concern for children in foster care, it is the policy of the New York legislature to find other permanent homes for the children and to end their temporary care, again without unnecessary delay. The legislative policy obviously was adopted in the children's best interests, as well as (when children are to be returned to their parents) the interests of their parents. In furtherance of the policy, the legislature directed that when children in temporary foster homes are to be returned to their parents, they are to be returned without formality, as soon as the parents seek the return of the children and are capable of properly caring for them. The legislative policy as enunciated in its findings in Social Services Law §384-b(1)(a) (enacted in 1976 but obviously applicable to the statutes in effect when the order on appeal was made) is:

"(i) it is desirable for children to grow up with a normal family life in a *permanent*¹⁰ home and that such circumstance offers the best opportunity for children to develop and thrive;

"(ii) it is generally desirable for the child to remain with or be returned to the natural parent

¹⁰Emphasis added.

because the child's need for a normal family life will usually best be met in the natural home, and that parents are entitled to bring up their own children unless the best interests of the child would be thereby endangered."

Social Services Law §384-b(1)(b)

"The legislature further finds that many children who have been placed in foster care experience unnecessarily protracted stays in such care without being adopted or returned to their parents or other custodians. Such unnecessary stays may deprive these children of positive, nurturing family relationships and have deleterious effects on their development into responsible, productive citizens.

* * *

The legislative policy set forth in Social Services Law §384-b was endorsed by The Citizens' Committee for Children of New York, Inc., Legal Aid Society, N.Y.S. Council of Voluntary Child Care Agencies, Association of Family Court Judges, City of New York, N.Y.S. Department of Social Services, Federation of Protestant Welfare Agencies, New York Council on Adoptable Children, and New York State Citizens' Coalition for Children.¹¹

Under the New York legislative scheme, children in foster homes must be returned to a fit parent at an agreed time or upon the occurrence of a specified event, without prior adversary proceedings.¹² It may fairly be assumed, as previously stated, that the New York legislative policy is dictated in part by the legislature's conclusion that parents will be discouraged

¹¹See letter of State Senator Pisani, Senate sponsor of the bill, to counsel to the Governor in Appendix to this brief at p.

¹²Unless there is a prior Court order to the contrary.

from placing children in foster care if, when a child's return is requested, there must be adverse hearings and a possible adverse decision, administrative review and Court review.¹³ The legislature must be deemed to have determined that such encouragement and assurance to parents will better serve the interests of the greater number of children, despite the possibility of transient damage to a child caused by the termination of his or her temporary relationship with a foster parent.

Under the New York legislative scheme, a full inquiry is conducted by the Family Court after a child has been in a foster home a year and a half and every two years thereafter. (Social Services Law §392) In the Family Court hearing in which all concerned parties are heard, and which meets all the requirements of due process, the Court may determine that the child should be continued in foster care, or that he or she should be returned immediately or in the future to a parent or relative.

The State (and the City of New York) enacted a number of other laws and regulations to safeguard the interests of a child in foster care against removal from a foster home when that is not in the child's best interests. There is a ten day notice and pre-removal conference with the foster parents, when the child is to be removed to another foster home.¹⁴ There are provisions for administrative hearings to determine the advisability of removing a child from a foster home.¹⁵

¹³Social Services Law §385.3; Article 78 New York Civil Practice Law and Rules.

¹⁴18 N.Y.C.R.R. §450.10. As promulgated, the regulation also applied to children to be returned to their parents. The rule has, we believe, been superseded, to the extent it applied to the return of children to their parents, by the enactment of N.Y. Social Services Law §384-a.

¹⁵Again, we assume that the hearings are not to be conducted when a child is to be returned to a parent.

(It is conceded that such proceedings do not meet all the requirements of due process.) The administrative determination and the reasonableness of the decision are subject to review by the Supreme Court of the State of New York, or an Appellate Division of that Court.¹⁶ A foster parent who believes a child should not have been removed, may also institute *habeas corpus* proceedings for the return of the child after he or she has been removed. All the demands of procedural due process are complied with in the several court hearings referred to.

The Court below, although it is not expert in child care, and there was little in the record to guide it, disagreed with the state legislative policy. The District Court determined that the state's interest as *parens patriae* in protecting children who are in foster care requires a full adversary hearing by an "administrative decisionmaker" before a child who has been in a foster home for a year may be removed from the foster home, whether the child is to be returned to his or her parent, or placed with an adoptive parent or is to be removed for any other reason (Joint Appendix 10a). The District Court in this case found existing state laws and procedures inadequate for the protection of a child in a foster home for a year or more (Joint Appendix 99). There is nothing in the record to justify the Court's determination that its policy and the procedure it ordered, are wiser and will better serve the interests of the greater number of children requiring foster care, than the policies adopted and procedures mandated by the state. See *Ferguson v. Skrupa*, 372 U.S. 726.

Although the Court below acknowledged that "the welfare of the child is best served by a speedy and final

¹⁶Article 78 N.Y. Civil Practice Law and Rules and Social Services Law §385.3.

decision as to his fate" (Joint Appendix 16a), it disagreed with the New York legislative policy of restoring a child to his or her fit parent, or transferring the child for adoption, quickly and without extended prior hearings. The District Court declared "the pre-removal procedures presently employed by the state are constitutionally defective." (Joint Appendix 9a).

The District Court ruled that to avoid "the possibility of arbitrary or misinformed action", a pre-removal hearing is required whenever a child is to be taken from a foster home in which he or she lived a year or longer (Joint Appendix 10a). "We hold", Judge Lumbard wrote for the District Court, "that before a foster child can be peremptorily transferred from the foster home in which he has been living, be it to another foster home or to the natural parents who initially placed him in foster care, he is entitled to a hearing at which all concerned parties may present any information to the administrative decisionmaker charged with determining the future placement of the child." (Joint Appendix 10a).

The District Court acknowledged that under existing New York law "[t]he continuing jurisdiction of the Family Court constitutes a safeguard against arbitrary state action." (Joint Appendix 14a). But the Court ruled that the proceeding in Family Court is not an adequate remedy, for the matter must be brought to the Family Court's attention, and the prevention of the improper removal of a child "cannot be made to depend upon the initiative of third persons." (Joint Appendix 14a).

Whether the best interests of children in foster care will be served by the speedy return to a fit parent or to a family interested in adopting the child (as the New York legislature directed) or by a prior adversary hearing with respect to the possible disadvantages of

removing a child from a foster home (as the Court below directed) should not be determined by this Court. "[I]t is for the legislature, not the courts, to balance the advantages and disadvantages" of one or the other policy. *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 487.

The decision of the District Court and the substitution of its social judgment for that of the New York State legislature was an "intrusion by the judiciary into the realm of legislative value judgment" *Ferguson v. Skrupa*, 372 U.S. 726, 729. And the intrusion in this case was in an area in which the District Court does not have jurisdiction or competence. As Mr. Justice Black wrote in *Ferguson v. Skrupa*, 372 U.S. at page 730 "courts do not substitute their social and economic beliefs for the judgment of legislative bodies . . . elected to pass laws." That is true particularly in a case such as this where a federal court is intruding upon an exclusive state legislative function. See *Younger v. Harris*, 401 U.S. at p. 681; *Hoffman v. Pursue, Ltd.*, 420 U.S. 592, 603-04.

The New York statutes held unconstitutional, as applied, by the Court below, together with the several other New York statutes and regulations enacted to protect children in foster care, are reasonably and rationally related to the accomplishment of the valid objective of the New York Legislature. The Court below therefor erred in striking the procedures provided for by the New York Legislature, and in substituting one devised by the Court. *Labine v. Vincent*, 401 U.S. 532, 537-540; *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483.

The right that the Lower Court held is being violated by the statutes held unconstitutional, is the right of a child who has been living with a foster parent for more than a year, to remain with the foster parent until it is

determined in an adversary hearing whether the child should be removed from the foster home. The Court below did not, in holding the New York statutes unconstitutional as applied, define the right sustained as a fundamental right or as one derived from a particular Constitutional provision or amendment. The right did not exist before the Lower Court's decision was announced and there is no legal, constitutional or social basis for the recognition of the right. The protection of any such right does not, as the New York Legislature determined, serve a foster child's best interests when the child is to be returned to his or her fit parent or is being placed in a home where it may be adopted. As shown in the next point, the Lower Court's order for the protection of the right it created, cannot accomplish the Court's stated objective.

POINT II

THE ORDER UNDER REVIEW IMPAIRS A CONSTITUTIONALLY-PROTECTED RIGHT AND IS NOT RATIONALLY RELATED, TO THE ACCOMPLISHMENT OF THE LOWER COURT'S OBJECTIVE.

The order of the District Court directed the conduct of administrative hearings whenever children are to be removed from a foster home in which they have been living for more than a year. At the hearings ordered the parents, foster parents and, in some circumstances, the children involved, are to present information with respect to the advisability of such removal (Joint Appendix 16a).

If hearings are to be conducted prior to the return of a child to his or her parent, the hearings will, at the least, delay, and may prevent, the child's return to his

or her parents. The hearings ordered obviously may result in a decision by the "administrative decision-maker" that although the parents want to resume care of their children and are capable of doing so, the children's return is deemed inadvisable. If such decision is not contemplated, there would be little purpose in conducting the hearings.¹⁷

A parent's right to "the companionship, care, custody, and management of his or her children"^{17a} is a fundamental, constitutionally-protected right. *Meyer v. Nebraska*, 262 U.S. 390, 399; *Stanley v. Illinois*, 405 U.S. 645. As the Court wrote in *Prince v. Massachusetts*, 321 U.S. 158, 166, "the custody, care and nurture of the child reside first in the parents whose primary function and freedom include preparation for obligations the state can neither supply *nor hinder*."¹⁸

The administrative hearings ordered by the District Court will, in most cases, delay and hinder, and in some cases, it might defeat, the preparation for a parent's obligation (and right) to care for her or his children. The order of the Lower Court therefore, if it does not meet the requirements of due process, deprives parents of children in foster care of their constitutionally-protected right. *Meyer v. Nebraska*, 262 U.S. at p. 399. Such regulation may be justified only by some "compelling state interest", *Bullock v. Carter*, 405 U.S. 134, and if a compelling interest exists, the regulation must be strictly scrutinized to ascertain if the government's interest may be achieved by less drastic means. *Skinner v. Oklahoma*, 316 U.S. 535, 541. The

¹⁷A parent's fitness will have been previously determined. Social Services Law §384-a, as amended, permits the retention of a child so long as a parent is incapable of caring for her or him.

^{17a}*Stanley v. Illinois*, 405 U.S. 645 at p. 650.

¹⁸Emphasis added.

order under review does not serve any compelling state interest. There is no state interest in keeping the child of a fit parent in the temporary care of a foster parent, *Stanley v. Illinois*, 405 U.S. 645, 657, 658.

The order on appeal assumes without justification, at least with respect to children who are to be returned to their parents, that parents who have placed children for foster care may not thereafter be able properly to care for their children, or that their children may be served better by remaining in a temporary situation than by return to a permanent home.¹⁹ There is no basis for either assumption merely because parents may have been compelled by circumstance to place their children in foster care for a time. See *King v. Smith*, 392 U.S. 309.

The means used by the Court below to achieve its objective are constitutionally indefensible. The order on appeal "sweep[s] unnecessarily broadly and thereby invade[s] the area of [a] protected" right (namely the right of a parent to the custody and care of his or her child). *Aptheker v. Secretary of State*, 378 U.S. 500, 508. The order on appeal requires an administrative hearing whenever a child who has been in a foster home for more than a year is to be removed, unless a Court ordered, or the foster parent requested, the child's removal. Thus, an adversary hearing is also required when a child has been in a foster home eighteen months or more, despite the fact that there will have been a full, adversary proceeding, or several proceedings, before the Family Court,²⁰ and an adjudication (but not an order for removal) shall have been made determining the child's best interests. The order is

¹⁹Presumably, the same unjustified assumptions are made with respect to a child's removal from a foster home for placement with a family that wishes to adopt it. Adoptive parents are, of course, previously screened.

²⁰Pursuant to Social Services Law §392.

unnecessarily broad also in requiring an adversary hearing before every child, who has been in a foster home for more than a year may be removed, despite the fact that generally the foster parent, and the child, do not want, and have no interest in, such hearings.

The proceedings mandated by the Court are not rationally related to the accomplishment of the Court's stated objective. Although designed to protect children in foster care (Joint Appendix 15a), there is no provision for the appointment of an adult to represent a child's interests in the proceedings ordered by the Court, unless the child does not need such assistance. The order provides for appointment of an adult to represent a child when it is determined that "the child's age, sophistication and ability effectively to communicate his [or her] own true feelings warrant such appointment." (Joint Appendix 16a). Presumably, a child who is able to communicate his or her feelings may make them known to the "decisionmaker," without the assistance of a guardian or advocate. Children who cannot articulate their needs are left without representation, despite the lower Court's recognition that the foster parents may have an adverse financial interest (Joint Appendix 14a) and despite the Court's objection to existing procedures on the ground that "the foster child whose future is at stake does not participate" (Joint Appendix 12a).

The narrow restriction of the District Court's order defeats its purpose. It is designed, as the Court wrote, to assure continuity of the personal relationship of a child in foster care (Joint Appendix 16a). The Court held that its decision was, of necessity, limited to "children in foster care for one year or longer" (Joint Appendix 10a). The Court further limited its order to children in foster homes "in which they have lived continuously for more than one year". (Joint Appendix

37a). Thus, children in foster care for more than a year who have not been in any one home for as long as a year, and who for that reason are more vulnerable, are not in any way affected by the order on appeal.

As noted in the preceding point, the order on appeal conflicts with the provisions of Section 384-a of the Social Services Law requiring the immediate return of a child to her or his fit parent at a specified time or under specified circumstances. When the time or circumstance for the return of a child occurs after a child has been in a foster home for a year, the authorized agency will be compelled to violate the statutory command that it "shall return such child at such time"²¹ or it will be required to violate the order on appeal enjoining it from attempting to remove a child from her or his foster home without notice and a hearing. We assume the District Court would not demand compliance with its order when compliance would violate Social Services Law §384-a.

CONCLUSION

FOR THE REASONS OUTLINED THE ORDER OF THE DISTRICT COURT UNDER REVIEW, SHOULD BE REVERSED.

Respectfully submitted,

HELEN L. BUTTENWIESER

575 Madison Avenue,
New York, New York 10022
Telephone No. (212) 826-1600

Attorney for Infant-Appellants

Danielle and Eric Gandy, etc.,

On the Brief:

EPHRAIM LONDON

FRANCIS L. VALENTE

²¹Social Services Law §384-a-2.



JOSEPH R. PISANI
38TH DISTRICT
WESTCHESTER COUNTY

1a
THE SENATE
STATE OF NEW YORK
ALBANY
12224

July 12, 1976

Hon. Judah Gribetz
Counsel to the Governor
Executive Chamber
The Capitol
Albany, New York 12224

RE: S.8850-A (Ten-Day bill)

Dear Mr. Gribetz:

My bill, S.8850-A, is now or will soon be before the Governor for Executive action. In response to your request for comments and recommendations concerning this bill, which is multisponsored by Senators Dunne and Halperin and which was introduced at the request of the Temporary State Commission on Child Welfare, I am enclosing herewith a copy of a memorandum in support thereof.

The bill constitutes a long-overdue recodification and modernization of the present inadequate and antiquated State law on the subject of termination of parental rights and statutory provisions related thereto. It is the product of over a year of intensive research conducted by the Commission for the State Department of Social Services in a Title IV-B funded project entitled,

"Barriers to the Freeing of Children for Adoption". A copy of the Commission's full report has been provided to your office and to other Executive Chamber personnel. As the report states, the legislation "represents, probably for the first time, a comprehensive, unified approach to a complex, highly specialized field and its inherent and systemic problems".

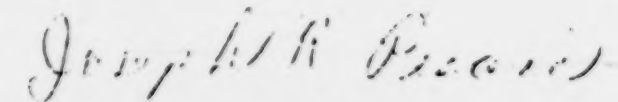
Public hearings were held by the Commission (in conjunction with the Assembly Standing Committee on Child Care) on the original draft of the bill on April 8 and 9 in Albany. At that time the views of concerned public and voluntary child care agencies, citizens and legal rights groups, judicial agencies and other interested parties were presented. The "A print" of the bill reflects a number of valid criticisms offered during the course of the hearings and other discussions on the bill. A copy of a staff memorandum explaining the amendments is also enclosed herewith.

I am informed that the bill is supported by almost every organization and agency in the field including, but not limited to, the following: Citizens' Committee for Children of New York, Inc., Legal Aid Society, N.Y.S. Council of Voluntary Child Care Agencies, Association of Family Court Judges, City of New York, N.Y.S. Department of Social Services, Federation of Protestant Welfare Agencies, New York Council on Adoptable Children, and New York State Citizens' Coalition for Children.

I am unabashedly proud of this bill. It strikes a delicate and thoughtful balance in its fairness to all parties and promotion of the best interests of children. However, my pride is edged with a feeling of profound sadness that a man who devoted countless hours of his valuable time and labor assisting in the development and drafting of the legislation passed away on the very day it passed the Legislature. Shad Polier's efforts on

behalf of the children of this State, not only on this bill but on numerous statutes during the last few decades, on the subject of foster care, adoption and child protection, will remain as a legacy of his selfless and humanitarian service. Inasmuch as I know Mr. Polier regarded this bill as a significant element, if not the acme of his long and distinguished career, I would respectfully request that the Governor, should he approve the legislation, send a "pen certificate" (or other appropriate gesture) to Mr. Polier's widow, former Family Court Judge Justine Wise Polier, as a fitting tribute to a man to whom we all owe a debt of gratitude.

Sincerely yours,



Joseph R. Pisani
STATE SENATOR

New York Social Services Law

§385. Orders; prohibiting placing out or boarding out; removal

3. Review of orders. Any person, agency, association, corporation, institution, society or other organization, aggrieved by the decision of the board in making any order pursuant to the provisions of this title, may institute, in the judicial district in which the applicant resides or has its chief office, a proceeding under article seventy-eight of the civil practice law and rules in which the reasonableness of such decision shall be subject to review.

§395. Responsibility of public welfare districts for the welfare of children

A public welfare district shall be responsible for the welfare of children who are in need of public assistance and care, support and protection, residing or found in its territory, insofar as not inconsistent with the jurisdiction of a family court. Such assistance and care shall be administered either directly by the public welfare official charged therewith, or by another public welfare official acting on his behalf by and pursuant to the provisions of this chapter, or through an authorized agency as defined by this chapter.

§398. Additional powers and duties of commissioners of public welfare and certain city public welfare officers in relation to children

Commissioners of public welfare and city public welfare officers responsible under the provisions of a special or local law for the children hereinafter specified shall have powers and perform duties as follows:

1. As to destitute children: Assume charge of and provide support for any destitute child who cannot be properly cared for in his home.

2. As to neglected, abused or abandoned children:

(a) Investigate the alleged neglect, abuse or abandonment of a child, offer protective social services to prevent injury to the child, to safeguard his welfare, and to preserve and stabilize family life wherever possible and, if necessary, bring the case before the family court for adjudication and care for the child until the court acts in the matter and, in the case of an abandoned child, shall promptly petition the family court to obtain custody of such child.

(b) Receive and care for any child alleged to be neglected, abused or abandoned who is temporarily placed in his care by the family court pending adjudication by such court of the alleged neglect, abuse or abandonment; and receive and care for any neglected, abused or abandoned child placed or discharged to his care by the family court.

(c) Report to the local registrar of vital statistics of the district in which the child was found the sex, color, approximate date of birth, place of finding, and the name assigned to any child who may be found whose parents are unknown, within ten days whenever possible after the child is found, on a form prescribed therefor by the state commissioner of health, and report the subsequent identification of any such child to the state commissioner of health; provided, however, that in the city of New York such form shall be prescribed by, and such report shall be made to the health services administration.

* * *

6. As to all foregoing classes of children:

(a) Investigate the family circumstances of each child reported to him as destitute, neglected, abused, delinquent, defective or physically handicapped in order to determine what assistance and care, supervision or treatment, if any, such child requires.

(b) Provide for expert mental and physical examination of any child whom he has reason to suspect of mental or physical defect or disease and pay for such examination from public funds, if necessary.

(c) Provide necessary medical or surgical care in a suitable hospital, sanatorium, preventorium or other institution or in his own home for any child needing such care and pay for such care from public funds, if necessary. However, in the case of a child or minor who is eligible to receive care as medical assistance for needy persons pursuant to title eleven of article five of this chapter, such care shall be provided pursuant to the provisions of that title.

(d) Ascertain the financial ability of the parents of children who became public charges and collect toward the expense of such child's care such sum as the parents are able to pay.

(e) Collect from parents whose children have been discharged to his care by the family court such sums as they are ordered to pay for the maintenance of such children and report any failure to comply with such order to such court.

(f) When in his judgment it is advisable for the welfare of the child, accept the surrender of a child by an instrument in writing in accordance with the provisions of this chapter. Any inconsistent provision of law notwithstanding, the acceptance by the social services official of an absolute surrender of a child born

out of wedlock from the mother of such child shall relieve her from any and all liability for the support of such child.

(g) Place children in suitable instances in family homes, agency boarding homes or group homes or institutions under the proper safeguards, either directly or through authorized agencies, except that, direct placements in agency boarding homes or group homes may be made by the public welfare official only if the board shall have authorized him to operate such homes in accordance with the provisions of section three hundred seventy-four-b of this chapter and only if suitable care is not otherwise available through an authorized agency under the control of persons of the same religious faith as the child. Placements shall be made only in institutions located in this state or in such institutions located in an adjoining state as are maintained by a corporation organized under the laws of this state and having authority to maintain an institution for the care of children. However, all placements shall be made in institutions visited, inspected, and supervised by the board and conducted in conformity with the rules of such board.

(h) Supervise children who have been cared for away from their families until such children become twenty-one years of age or until they are discharged to their own parents, relatives within the third degree of guardians, or adopted.

(i) Provide care in an institution, agency boarding home, or family free or boarding home for any destitute minor between sixteen and eighteen years of age who cannot be properly cared for in his own home, either directly or through authorized agencies, except that, direct placements in agency boarding homes may be made by the public welfare official only if the board shall have authorized him to operate such

homes in accordance with the provisions of section three hundred seventy-four-b of this chapter and only if suitable care is not otherwise available through an authorized agency under the control of persons of the same religious faith as the child. Such care may be continued after the eighteenth birthday of the minor and until he is discharged from care or becomes twenty-one years of age.

(j) Permit children and minors who are being cared for away from their own homes as public charges to retain up to fifty dollars per month of their earned income for future identifiable needs in accordance with the regulations of the department.

(k) In accordance with regulations of the department, make such payments for the care and support of a child or minor who has been placed out for adoption or who has been adopted, as in his judgment are necessary for the welfare of such child or minor. With respect to a child with such special, unusual or significant physical or emotional handicaps as, in his judgment, to be an obstacle to adoption he may enter into a contract with the adoptive parents subject to the approval of the department for a

* * *

(n) In accordance with the regulations of the department, is authorized to provide services to prevent the placement of children in foster care, provided, however, that such preventive services shall be authorized only if the director of the division of the budget determines, after evaluating the results of demonstration projects authorized pursuant to chapter nine hundred eleven of the laws of nineteen hundred seventy-three and chapter fifty-three of the laws of nineteen hundred seventy-four, that the preventive services provided under such projects are feasible as

effective methods for preserving and restoring family units and that providing such services would result in fiscal savings to the state and local social services districts. Such services may be provided directly or with the approval of the state commissioner of social services through purchase from any agency authorized by regulation of the department to provide such preventive services to children; however, each local social services commissioner shall, prior to providing such preventive services, make findings that the children will be placed in foster care unless such services are provided and that it is reasonable to believe that by providing such services the child will be able to remain with his family.

7. Notwithstanding any inconsistent provisions of law, no city forming part of a county public welfare district may hereafter assume any of the powers, duties and responsibilities mentioned in this section. However, this subdivision shall not be deemed or construed to prohibit a public welfare officer of a city forming part of a county public welfare district from exercising and performing on behalf of the county commissioner of public welfare, pursuant to the provisions of title three-a of article three, any of the powers and duties mentioned in this section. A city forming part of a county public welfare district which heretofore assumed or upon which was heretofore imposed the responsibility for providing any or all of the assistance, care and service mentioned in this section, shall hereafter continue to have such responsibility, provided, however, that the continuance of such responsibility shall be consistent with the powers, duties and responsibilities of such city under and pursuant to the provisions of title three-a of article three.

8. A public welfare official who is authorized to place children or minors in homes or institutions

pursuant to provisions of this section shall have the power to place children or minors in a public institution for children.

9. A social services official shall have the same authority as a peace officer to remove a child from his home without an order of the family court and without the consent of the parent or person responsible for such child's care if the child is in such condition that his continuing in the home presents an imminent danger to the child's life or health. When a child is removed from his home pursuant to the provisions of this subdivision, the social services official shall promptly inform the parent or person responsible for such child's care and the family court of his action.

10. Any provision of this chapter or any other law notwithstanding, where a foster child for whom a social services official has been making foster care payments is in attendance at a college or university away from his foster home, a social services official may make said foster care payments to such college or university in lieu of payment to the foster parents, for the purpose of room and board, if not otherwise provided, but such payments shall not exceed the amount that would have been paid to the foster parents had the child remained in the foster home.

§398. (As amended in 1976) Additional powers and duties of commissioners of public welfare and certain city public welfare officers in relation to children

Commissioners of public welfare and city public welfare officers responsible under the provisions of a special or local law for the children hereinafter specified shall have powers and perform duties as follows:

1. As to destitute children: Assume charge of and provide support for any destitute child who cannot be properly cared for in his home.

2. As to neglected, abused or abandoned children:

(a) Investigate the alleged neglect, abuse or abandonment of a child, offer protective social services to prevent injury to the child, to safeguard his welfare, and to preserve and stabilize family life wherever possible and, if necessary, bring the case before the family court for adjudication and care for the child until the court acts in the matter and, in the case of an abandoned child, shall promptly petition the family court to obtain custody of such child.

(b) Receive and care for any child alleged to be neglected, abused or abandoned who is temporarily placed in his care by the family court pending adjudication by such court of the alleged neglect, abuse or abandonment including the authority to establish, operate, maintain and approve facilities for such purpose in accordance with the rules of the board of social welfare; and receive and care for any neglected, abused or abandoned child placed or discharged to his care by the family court.

(c) Any facility designated as of the effective date of this act shall not be disapproved except after consultation with the designating appellate division.

(d) The local social services department shall list all facilities approved under this article for the temporary custody and care of children remanded by the family court and shall file a copy of that list periodically with the clerk of the family court in each county in the judicial district in which the facility is located.

(e) Report to the local registrar of vital statistics of the district in which the child was found the sex, color, approximate date of birth, place of finding, and the

name assigned to any child who may be found whose parents are unknown, within ten days whenever possible after the child is found, on a form prescribed therefor by the state commissioner of health, and report the subsequent identification of any such child to the state commissioner of health; provided, however, that in the city of New York such form shall be prescribed by, and such report shall be made to the health services administration.

[See main volume for text of 3 to 5]

6. As to all foregoing classes of children:

[See main volume for text of (a) to (e)]

(f) When in his judgment it is advisable for the welfare of the child, accept the surrender of a child by an instrument in writing in accordance with the provisions of this chapter. Any inconsistent provision of law notwithstanding, the acceptance by the social services official of a surrender of a child born out of wedlock from the mother of such child shall relieve her from any and all liability for the support of such child.

[See main volume for text of (g) to (m)]

(n) In accordance with the regulations of the department, is authorized to provide services to prevent the placement of children in foster care. Such services may be provided directly or with the approval of the state commissioner of social services through purchase from any agency authorized by regulation of the department to provide such preventive services to children; however, each local social services commissioner shall, prior to providing such preventive services, make findings that the children will be placed in foster care unless such services are provided and that it is reasonable to believe that by providing such services the child will be able to remain with his family.

[See main volume for text of 7 to 10]

11. In the case of a child who is adjudicated a person in need of supervision or a juvenile delinquent is placed by the family court with the division for youth and who is placed by the division for youth with an authorized agency pursuant to court order, the social services official shall make expenditures in accordance with the regulations of the department for the care and maintenance of such child during the term of such placement subject to state reimbursement pursuant to this title, or article nineteen-G of the executive law in applicable cases.